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No. 95-897

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In The
Supreme Court of the United States

OCTOBER TERM, 1995

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NON-UNION EMPLOYEES IN THE PRIVATE & PUBLIC SECTORS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT REGARDING CONSENT

Michael T. Leibig, counsel for petitioners, and John B. Renick, counsel for respondents, have given their consent to the filing of this *amicus curiae* brief. Their letters of consent accompany this brief.

INTEREST OF THE *AMICUS CURIAE*

This *amicus curiae* brief is submitted by members of the Florida Bar who litigate Fair Labor Standards Act cases. It represents the interests of employees in both the private and public sectors who are not members of unions, and employees in the public sector who are not employed in public safety.

SUMMARY OF THE ARGUMENT

It is important to place the salary basis test regulation in proper perspective. The salary basis test benefits employers because compliance with its provisions means the employer does not have to pay extra wages for overtime hours worked.

It is a key objective test used by the Department of Labor to evaluate the employment relationship to determine whether purported "executives, administrators and professionals", are truly employed in that capacity.

It helps protect employees from being arbitrarily and inappropriately designated as exempt executives. An employer is not likely to accord executive and professional status with its attendant latitude in time management and exemption from punishment for minor work rule violations, unless the employee is truly an executive or professional.

It also gives the employee designated by his or her employer as exempt, a benefit in exchange for loss of eligibility for overtime wages. Moreover, in keeping with the goals of the FLSA, it helps protect the employee against unrelieved extensive work hours. The true executive must be given latitude in the use of work time and thus may partially offset a long work day with a partial day absence later.

The salary basis test applies in the public sector. Its provisions had been in place for decades prior to the 1974 and 1985 amendments to the FLSA and are therefore considered incorporated into the statutory text. Furthermore, public sector employ-

ers were actively involved in the 1985 amendments and were able to obtain special exemptions from Congress, yet the salary basis test remained intact. The public sector availed itself of the political process, it worked as designed, and the public sector was not given an exemption from the salary basis test.

The regulation requires that employees designated as exempt executives and professionals by their employer, be paid a guaranteed salary which is not subject to reduction based upon quality or quantity of work performed. Its plain language does not require actual deductions before the executive exemption is jeopardized, only that the employee's pay be *subject* to reduction.

Every circuit court of appeals to have addressed the issue acknowledges that under the regulation, an executive employee may not be *subjected* to docking for prohibited reasons. The majority have held that the existence of an express written policy authorizing docking for impermissible reasons, is sufficient evidence to prove affected employees were subjected to docking. This is the better reasoned approach.

Since the regulation expressly forbids having such a policy for salaried executives and professionals, the existence of such a policy serves no legitimate purpose -- it simply has no place in the employment relationship. Indeed, its existence could have no other purpose than to threaten -- *subject* -- purported executives with loss of pay for reasons not permitted by the regulations. The majority view also properly focuses attention on the

terms and conditions of the employment relationship, rather than on whether (and how many) executives ever broke minor work rules.

The minority and most restrictive view, is that evidence of actual docking must be shown in order to prove affected employees were subjected to an impermissible policy. Even where this view governs however, it takes only a single instance of actual docking made pursuant to policy, to prove all similarly situated employees were *subjected* to docking under the policy.

Even in the minority view, the test is only whether the employer ever actually implemented its impermissible policy. The test is not how many "rule-breaking" employees the employer has had.

Otherwise, "executives'" eligibility for overtime wages would turn on whether they actually violated minor work rules, rather than on whether they were employed in a bona fide executive or professional capacity, as required by statute.

Of course, since the burden of proving entitlement to the exemption is at all times on the employer, it is the employer that must prove it never subjected its purported executive and professional employees to pay-docking for prohibited reasons. Accordingly, the employer must prove it neither had a written policy pursuant to which the executive class could be docked, nor an incident of actual docking inflicted on a member of the executive/professional class. At a minimum, the employer must be able to prove it never actually

docked an executive class member for a reason prohibited under the regulations.

With respect to the window of correction, it is there to avoid the harsh results that might otherwise be imposed on an employer that innocently and carelessly may have had an isolated incident of docking where no policy existed to do so.

It should be read conjunctively so the employer must prove that the docking was both inadvertent and for a reason other than lack of work. Even though the word "or" may have been used, to read it disjunctively would render the word "inadvertent" meaningless and irrelevant because it would always be consumed by, "*all* reasons" (except lack of work).

Indeed, a disjunctive reading would render the regulation invalid. By effectively writing "inadvertent" out of the regulation, the regulation would then clash with the language and purpose of the FLSA. It would actually allow employers violating the FLSA "advertently" (willfully, with knowledge it is prohibited), as well those without a good faith reasonable basis for their conduct, to escape all liability after they are sued for what may have been years of violations.

Moreover, since a lawsuit would expose the employer to no adverse consequences whatsoever, there would be no incentive at all for employers to comply. And, since employees would always lose a lawsuit even where they could conclusively prove the employer violated the FLSA, it effectively strips employees of any remedy. Such absurd results

would eviscerate the compensation and deterrence objectives of the FLSA.

A conjunctive reading makes more sense. It is faithful to the statute and regulations as a whole. It is an interpretation endorsed by the DOL itself, and an interpretation embraced by the vast majority of circuit courts of appeals that have addressed the issue.

In those narrow circumstances where an employer may be eligible for the window of correction, it must truly make a correction. It must repay all monies docked, and must promise future compliance with all wage and hour provisions of the FLSA and its regulations. To require anything less would be to force employees to bring piecemeal litigation to force correction of each and every impermissible rule, one at a time.

Indeed, if an employer does *not* correct all its regulation-violating rules promptly after it is sued or promptly after its error is brought to its attention, its violation is willful and outside the scope of the window of correction altogether.

ARGUMENT

I. A PERSPECTIVE ON THE SALARY BASIS TEST

A. The Salary Basis Test Benefits Employers; Is A Key Objective Indicator Of The Employment Relationship; Protects Employees From Arbitrary Designation & Oppressive Work Hours; Provides Exempt Employees With A Benefit In Exchange For Loss Of Wages

1. *The salary basis test benefits employers.* If the employer complies with all requirements of the test, it may designate certain of its employees as bona fide executives or professionals who are exempt from the otherwise mandatory overtime requirements of the FLSA. It may then legitimately exempt qualifying employees from receiving extra pay regardless of the number of overtime hours the employee works.

Since it benefits employers to be exempt from paying otherwise mandatory overtime wages, employers must comply with all conditions imposed for use of that benefit, or lose eligibility for it. *Moreau v. Klevenhagen*, 113 S.Ct. 1905, 1912 n. 16 (1993).

2. *The salary basis test is a key objective indicator.* Using the salary basis test, the Department of Labor (DOL), or a court, may objectively assess the terms and conditions of the employment relation-

ship to see if employees alleged to be bona fide exempt executives, are actually employed in that capacity.

This is accomplished by looking to the written rules and regulations governing the relationship, and to payroll records to see if purported executives lost pay for impermissible reasons.

The valuable role played by the salary basis test has been recognized. *See, e.g., Craig v. Far West Engineering Co.*, 265 F.2d 251, 259 (9th Cir. 1959), cert. denied, 361 U.S. 816 (1959) (quoting report of DOL that it is the "best single test of the employer's good faith in characterizing the employment"; court concluding regulation is "sound and apparently the one practical method of 'defining and delimiting'" the statutory terms); *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 185 (3rd Cir. 1988) (salary basis requirement founded "not on logical necessity, but on empirical study"); *Walling v. Yeakley*, 140 F.2d 830, 832 (10th Cir. 1944) (upholding validity as lawfully delegated and exercised); *Thomas v. County of Fairfax*, 758 F.Supp. 353, 360 (E.D. Va. 1991) (regulation embodies "practical understanding of the term 'bona fide executive'").

In addition, since the salary basis test is a legislative regulation, promulgated pursuant to the broad grant of authority given the DOL in 29 U.S.C. §213(a)(1), it has the force and effect of law. *See Shalala v. Guernsey Memorial Hospital*, 115 S.Ct. 1232, 1239 (1995); *Chrysler v. Brown*, 441 U.S. 281, 295-296 (1979).

3. *The salary basis test protects employees*. The salary basis test protects employees from arbitrary and inappropriate designation as executives, administrators, or professionals exempt from the mandatory overtime provisions of the FLSA. As a practical matter, an employer is simply not likely to designate employees as executives and professionals, guarantee them a salary, promise not to dock their pay for partial day absences, and not to dock their pay for breaking minor work rules, unless they are *truly* employed in an executive, administrative, or professional capacity. Under such circumstances, an employer is also not likely to designate a large percentage of its work force as executives working long hours without additional pay. This restraint is faithful to the goals of the FLSA.

The purpose of the FLSA is the "maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers * * *." 29 U.S.C. § 202(a). It seeks to protect against oppressively long work hours. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352 (11th Cir. 1982); *Mitchell v. Lubin, McGaughy & Associates*, 358 U.S. 207, 211 (1959) (exceptions to FLSA are narrowly construed to further congressional goal of providing broad federal employment protection).

Because she is paid for the job done, and not for the number of hours actually worked, under the salary basis test, an executive must not suffer loss of pay because she did not work a required number of hours in a day. Accordingly, if she works an especially long day, she may relieve the stress of those long hours by arriving late or leaving early

the next day or week without fear of loss of pay. Again, this is faithful to the goals of the FLSA.

4. *Payment on a salary basis compensates employees for loss of entitlement to overtime wages*. When an employer unilaterally decides to designate an employee an executive for purposes of exempting him from overtime wages, the employee loses something of value. With the requirement he be paid on a salary basis, the executive gets something of value in return for the loss. He gains freedom and discretion in use of his work time, and freedom from being subjected to loss of pay for minor rule infractions and partial day absences.

Otherwise, the employer could strip the employee of entitlement to extra wages and in exchange give her only more work, an unlimited number of extra work hours, and more responsibility. This would encourage abuse and conflict with the remedial and humanitarian purposes of the FLSA.

B. The Salary Basis Test Should Apply In The Public Sector Because The Political Process Functioned As It Was Designed To Function

The FLSA is a law of general applicability to both the public and private sectors. *New York v. U.S.*, 112 S.Ct. 2408, 2420 (1992). The salary basis test should apply to both sectors as well.

First, for decades, the salary basis test has been a part of the regulations defining the statutory terms "executive, administrative, and professional" set forth in 29 U.S.C. §213(a)(1). When Congress

amended the FLSA in 1974, and again in 1985 to include the public sector in its entirety, Congress and the DOL enacted special provisions applicable only to the public sector. *See, e.g.*, 29 U.S.C. §207(k) (special calculation), §207(o) (compensatory time); and 29 C.F.R. Part 553. Yet, the salary basis test remained unchanged.

When an agency's interpretation has been in place for a long period of time and is not changed when Congress subsequently amends the statute, it is presumed Congress knew of its existence and intended that the pre-existing definitions be incorporated into the statutory terms. *See Qualitex Co. v. Jacobson Products Co., Inc.*, 115 S.Ct. 1300, 1308 (1995) (since Congress re-enacted statutory terms "against a legal background in which those terms had come to include [the term] color, [] its statutory revision embraced that understanding"); *Commissioner of Internal Revenue v. Keystone Consolidated*, 113 S.Ct. 2006, 2011 (1993) (where term acquired a settled judicial and administrative interpretation over half a century before Congress enacted the amendment, Congress "presumptively was aware * * * phrase * * * [had been] consistently construed"); *Lindahl v. OPM*, 470 U.S. 768, 782 n. 15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

Indeed, when Congress does not overrule an agency's interpretation, that is evidence the construction was reasonable. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

Second, when the FLSA was amended in 1985 following the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), public sector employers were actively involved in fashioning the amendments. *Local 2203 v. West Adams County*, 877 F.2d 814, 821, n. 10 (10th Cir. 1989) ("state and local governments were intensely involved in the proceedings leading to the FLSA amendments"); S.Rep. No. 159, 99th Cong., 1st Sess. 7-10, *reprinted in*, 1985 U.S.C.C.A.N. 651, 655-658. Yet, even after substantial public sector employer involvement, the salary basis test remained part of the regulations.

Third, when the DOL amended the regulation in 1991, codified at 29 C.F.R. §541.5d, to provide a narrow exception for those public sector employers who were prevented from complying with the partial day absence portion of the salary basis test because they had public accountability laws in place, again public sector employers actively lobbied the DOL. 57 Fed.Reg. 37,666, 37,670 (August 1992) (229 governmental entities registered their comments). Yet, all other portions of the salary basis test, including the disciplinary docking rule, remained.

As the Court held in *Garcia*, 469 U.S. 528 (1985), and reiterated in *South Carolina v. Baker*, 485 U.S. 506, 512-513 (1988), and *Gregory v. Ashcroft*, 501 U.S. 452, 464, 477 (1991), the public sector must find its protection from congressional regulation through the national political process.

Public sector employers have certainly availed themselves of the national political process with

respect to the FLSA. Nonetheless, the salary basis test has remained applicable to them (with the narrow exception in 541.5d, applicable prospectively from September 1992). Public sector employers may not have received everything they wanted, but neither did employees in the public sector. The key is the political process worked.

Notably, public sector employers still have a choice. If an employer, public or private, chooses to retain the discretion to reduce the pay of its executives and professionals for violating minor work rules, it may do so, but must be prepared to pay them for the overtime hours they work. *See Avery v. City of Talladega*, 24 F.3d 1337, 1341 (11th Cir. 1994):

> Of course, the City may suspend employees without pay for other types of insubordination or misconduct [other than major safety violations], but the price for doing so is loss of its ability to treat those employees as executive, administrative, or professional employees exempt from overtime pay.

Or, the employer may accord that degree of freedom and latitude to only its highest level of employees. As with any other employer, however, a public sector employer should not be permitted to "have its cake and eat it too", namely treating its "executives" as hourly employees in every way that matters except for payment for overtime hours. *See Moreau v. Klevenhagen*, 113 S.Ct. 1905, 1912 n. 16 (1993) (if public employer does not comply with all conditions for exemption, it must pay

overtime wages just as every other employer must do).

Recently, the entirety of the pre-1991 salary basis test as applied to the public sector was declared invalid *ab initio* partly because, according to the court, the DOL was entitled to little or no *Chevron*, 467 U.S. 837 (1984), deference because it took too long to amend the test (29 C.F.R. 541.5d) for partial day absences in the public sector. *Service Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1356-1359 (9th Cir.) (1995), cert. denied, 116 S.Ct. 774 (1996) (*SEIU*).

Because, however, the DOL was given the broadest possible discretion in 29 U.S.C. § 213(a)(1), to define the exemption's terms, "from time to time", the agency's action or inaction was "committed to agency discretion by law", and is thus not reviewable. *See Heckler v. Chaney*, 470 U.S. 821, 830-831 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (agency action not reviewable when statute granting agency discretion is so broad that it provides no law for courts to apply).

In reaching its conclusion that the pre-1991 salary basis test was invalid as applied to the public sector, the *SEIU* court relied almost exclusively on comments made by the DOL in 57 Fed.Reg. 37,666 (August 1992), codifying 541.5d. Those post-hoc statements on congressional intent, however, were merely the DOL's rationalization for changing its long-standing rule on docking for partial day absences. The comments are thus not entitled to

any great weight or deference when the question is one of congressional intent. *See Gustafson v. Alloyd Co., Inc.*, 115 S.Ct. 1061, 1071, 1072 (1995):

> After-the-fact statements by proponents of a broad interpretation are not a reliable indicator of what Congress intended when it passed the law * * *. [I]t is preferable to consult the documents prepared by Congress when deliberating.

Rather, "It is the intent of the Congress that enacted [the section] * * * that controls." *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977).

As cautioned in *Gustafson, id.*, "Material not available to lawmakers is not considered, * * *, to be legislative history". Instead, if resort to congressional intent is warranted with respect to the 1985 amendments to the FLSA, we must review the legislative history from that time.

When we do, we see the record is devoid of any instruction or suggestion from Congress that the DOL was to change the salary basis test in a particular way, or at a particular time, or at all. In contrast, *see* S.Rep. No. 159, 99th Cong., 1st Sess. 14, 19, *reprinted in*, 1985 U.S.C.C.A.N. 651, 662, 667, directing DOL to promulgate regulations by March 15, 1996 on the new "volunteer" language added in the amendments.

The salary basis test, as narrowly amended prospectively from September 1992, is entitled to

deference and should be applied to the public sector.

C. "Subject to" Versus Actual: The Better Reasoned Rule Is That An Express Policy Of Docking Pay For Reasons Prohibited By The Regulations Means Those Subected To The Policy Are Not True "Executives"

The better reasoned rule is that the existence of an express policy under which a class of employees may be docked pay for reasons prohibited by the regulations, renders that class of employees not exempt from the FLSA.

An employer may have an express policy of pay docking, in a number of ways. It may expressly authorize docking in writing. It may actually dock pay. It may do both. When the employer does both, that is certainly the clearest evidence that the affected employees were indeed subjected to such a policy. Conversely, if the employer has neither, that is the clearest evidence employees are not subjected to docking (assuming they are not verbally threatened with docking).

The circuit courts of appeals to have addressed the salary basis test thus far, have all acknowledged that under the plain language of the regulation, 29 C.F.R. §541.118(a), executives and professionals exempt from overtime wages, may not have their predetermined, guaranteed salary *subjected* to reduction based upon quality or quantity of work performed. Notably, the plain meaning of the term "subject to" is: "governed or affected by; * * *

answerable for". Black's Law Dictionary 1278 (5th ed. 1979).

Accordingly, the vast majority have concluded that having an express policy of docking for impermissible reasons, is sufficient evidence that similarly situated employees governed by the policy, were subjected to it.

The most recent decisions reaching this conclusion are: *Bankston v. State of Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Balgowan v. New Jersey*, 84 F.3d 656, 662, *reh'g granted*, 84 F.3d 667 (3rd Cir. 1996); *Carpenter v. City and County of Denver*, 82 F.3d 353, 359 (10th Cir. 1996); and *Yourman v. Dinkins*, 84 F.3d 655, 656 (2nd Cir. 1996). The Third and Tenth Circuits joined previous decisions in the Seventh and Second Circuits [1], and decisions in the D.C., Fourth, Sixth, and Ninth Circuits.[2]

The majority view makes sense for two reasons. First, simply put, since the regulations do not

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[1] *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2nd Cir. 1991), cert. denied, 113 S.Ct. 298 (1992); *Klein v. Rush-Presbyterian-St. Luke's*, 990 F.2d 279, 286 (7th Cir. 1993).

[2] *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C. Cir. 1993); *Shockley v. City of Newport News*, 997 F.2d 18, 24-25 (4th Cir. 1993); *Michigan Ass'n of Government Employees v. Michigan*, 992 F.2d 82, 86 (6th Cir. 1993); *Abshire v. County of Kern*, 908 F.2d 483, 487 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991); *Hurley v. State of Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Barner v. City of Novato*, 17 F.3d 1256, 1262 (9th Cir. 1994).

permit such a policy with respect to executives exempt from overtime, the existence of such a written policy would serve no legitimate purpose. Its only conceivable purpose would be to *threaten* purported executives with docking for reasons not permitted under the regulations. "Executives" threatened with docking, have no doubt been *subjected* to docking.

Second, employees whose terms and conditions of employment include a written policy under which their pay may be docked at the employer's option, are no less subjected to that policy than those who may actually be docked. *See Michigan Ass'n of Government Employees v. Michigan*, 992 F.2d 82, 86 (6th Cir. 1993) (employees not actually docked are also affected by the policy because they are forced to juggle schedules and forgo opportunities to avoid being docked).

Perhaps the case most often cited for the proposition that evidence of actual docking is necessary to prove employees were subjected to docking is *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991). This is a minority view endorsed only in *McDonnell v. Omaha*, 999 F.2d 293, 296 (8th Cir. 1993) ("mere possibility of an improper deduction in pay does not defeat an employee's salaried status"), cert. denied, 114 S.Ct. 1188 (1994); and less clearly in *York v. City of Wichita Falls*, 944 F.2d 236, 242 (5th Cir. 1991) (summary judgment for employees *vacated*; remanded because determination of salaried status required resolution of material fact where no evidence of actual docking was offered,

and affidavits and testimony asserted no such policy existed and no docking ever occurred).

Atlanta Firefighters was later explained, however, in *Avery v. City of Talladega*, 24 F.3d 1337, 1341 (11th Cir. 1994). The law in the Eleventh Circuit is that evidence of an instance of actual docking is at first necessary, but then sufficient, to prove the class of employees was subjected to a policy rendering them non-exempt from overtime wages.

Indeed, since *one* instance of docking occurred for impermissible reasons, the *Avery* court found it unnecessary to even review the circumstances surrounding the second instance of docking: "We hold that the suspension of Lt. Jacks destroyed not only his exempt status but that of the other lieutenants as well", so it was unnecessary to look at the other lieutenant's suspension. *Avery* at 1342.

Accordingly, even if the rule is that evidence of actual docking is necessary to prove the impermissible policy was actually implemented, only a minimal showing should be necessary.

Otherwise, (1) the focus would be on the number of "executives" who broke minor work rules, rather than on the nature of the terms and conditions of the employment relationship, where the focus belongs; and (2) courts would be thrown into a "numbers game", where in some jurisdictions docking one percent or more of the class of employees may be sufficient to show the class was subjected to docking, while in other jurisdictions docking five percent or less would not be sufficient evidence. In

an area of federal law where uniformity in the application of the statute is so important, this result would be unacceptable.

II. ANALYSIS OF THE "WINDOW OF CORRECTION"

A. The Window of Correction Should Be Read Conjunctively So That An Employer Must Prove Its Docking Was Both Inadvertent And For Reasons Other Than Lack of Work

The regulation known as the "window of correction" is set forth in 29 C.F.R. §541.118(a)(6). By its own terms, whether it applies depends upon the "facts in the particular case." Furthermore, the second and fourth sentences are meant merely to compare deductions generally made when reasons are lack of work, to deductions inadvertently made when the reasons are not lack of work:

> Where deductions are generally made when there is no work available, * * *. On the other hand, where a deduction * * * is inadvertent, or is made for reasons other than lack of work, * * *.

The present controversy centers on the use of the word "or" in the regulation. The court in *Auer v. Robbins*, 65 F.3d 702, 711 n. 7 (8th Cir. 1995) agreed with *Lee v. Flightsafety Services, Corp.*, 20 F.3d 428, 433 (11th Cir. 1994) that in all cases the window must be read disjunctively so either circumstance, inadvertence, or all reasons (except lack of work), suffice. Under *Auer-Lee*, the regulatory term "inadvertent" is thus irrelevant and immaterial to a determination of whether an employer is eligible to escape liability through the window of correction.

The *Auer-Lee* holding conflicts with the DOL's interpretation of its own regulation. *See Salary Basis*, Wage & Hour Manual (BNA) 99:5257 (December 24, 1991) where the DOL stated impermissible disciplinary docking which:

> occur[s] on a regular and recurring basis (e.g., because of an employer's policy), [results in loss of exemption for] such employees, including all of those in the "class" or "category" of employees affected by such deductions, * * * and the exemption may be denied in *all* work weeks.

(Emphasis in original)

It also conflicts with five other circuit courts of appeals to have addressed the issue: *Balgowan v. New Jersey*, 84 F.3d 656, 663, *reh'g granted*, 84 F.3d 667 (3rd Cir. 1996), (window "only applies to inadvertent errors * * * [and] [a]ny docking made pursuant to a written policy, * * *, may not be considered 'inadvertent'"); *Kinney v. District of Columbia*, 994 F.2d 6, 11 n. 5 (D.C. Cir. 1993) (dicta) ("regulation * * * merely provides an escape clause for employers who inadvertently make improper deductions"); *Martin v. Malcolm Pirnie*, 949 F.2d 611, 616-617 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992) (window "allows employer that makes an impermissible, but inadvertent, deduction * * * to correct

the error"); *Klein v. Rush-Presbyterian*, 990 F.2d 279, 287-288 (7th Cir. 1993) ("intentional and impermissible deductions made for reasons other than lack of work do not meet the window's requirements"); *Abshire v. County of Kern*, 908 F.2d 483, 489 (9th Cir. 1990), cert. denied, 498 U.S. 1068 (1991) ("exception is for the employer that makes a one-time improper deduction and then corrects its error").

There are serious defects in *Auer-Lee's* reasoning:

1. *The plain meaning of "or" includes a conjunctive interpretation.* There is precedent for using the words "or" and "and" interchangeably if the context requires. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570, 573 (1956) ("or" often used carelessly for "and"); *U.S. v. Fleet Factors*, 901 F.2d 1550, 1554 n. 3 (11th Cir. 1990) (construing "and" as "or" because more faithful to statute; use of "and" deemed "careless statutory drafting"); *U.S. v. Moore*, 613 F.2d 1029, 1040 nn. 85, 86 (D.C. Cir. 1979) (collecting cases where "and" substituted for "or").

Indeed, the plain meaning of the word "or" includes a conjunctive interpretation. *See* Black's Law Dictionary 987 (5th ed. 1979), defining "or":

> In some usages, * * * creates a multiple rather than an alternative obligation; [and] where necessary in interpreting an instrument, "or" may be construed to mean "and".

2. *A disjunctive interpretation violates three tenets of statutory construction: an interpretation rendering one part void or insignificant must be avoided; an interpretation should not thwart legislative purpose; an interpretation should not destroy the act.* The *Auer-Lee* holding results in improper judicial rewriting of the regulation because it writes "inadvertent" out of the regulation. It allows a court to excuse even years of willful violations, violations wholly lacking good faith and a reasonable basis, as long as prohibited docking is for any and all reasons (except lack of work). Surely the word "inadvertent" was included in the regulation for a reason. The word surely means more than a useless, redundant substitute for "reasons other than lack of work". It is improper to simply ignore it.

The interpretation violates a basic tenet of statutory construction that courts should refrain from construing a provision in a way that renders another provision meaningless. *See, e.g., Ratzlaf v. U.S.*, 114 S.Ct. 655, 659 (1994); *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993) (courts should construe statute "so that no part of it will be inoperative or superfluous, void or insignificant").

An interpretation must also lead to a rational result and be faithful to the purpose of the statute:

> If an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, a less literal construction must be considered.

U.S. v. Campos-Serrano, 404 U.S. 293, 298 (-1971). *See also Crandon v. U.S.*, 494 U.S. 152, 158 (1990) ("we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527-529 (1989) (J. Scalia, concurring) (disavowing literal meaning because led to absurd, irrational result having no support in text of the statute).

The object and purpose of the FLSA would be thwarted for the reasons set forth in discussion 3., below, regarding the invalidity of the regulation if given the meaning advanced in *Auer-Lee*.

It simply makes no sense to construe the regulation to mean the DOL established the elaborate set of rules at 29 C.F.R. §§541.118, 541.1, 541.2 and 541.3, and then in 541.118(a)(6) effectively said, "never mind" because even if eventually caught, all that needs to be done to escape liability without adverse consequence, is to do what should have been done before you were caught. *See Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself.").

3. *A disjunctive interpretation renders the regulation invalid.* Under an ADEA regulation at issue in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), the court held a DOL-EEOC interpretative regulation was invalid because it permitted employers to avoid liability based solely upon an objective test, "cost-justification", while ignoring the statute's subjective intent

criteria -- whether employer engaged in "subterfuge", or had an "intent to evade" the statute's requirements.

Similarly, the window of correction is a DOL interpretative regulation which according to *Auer-Lee*, allows an employer to escape liability based solely upon an objective standard, "reasons other than lack of work", while altogether ignoring the employer's subjective intent. Analysis of the employer's subjective intent is a key, and pervasive element of the FLSA.

First, an employer may escape liability only if it pleads and proves its act or omission was in good faith conformity with, and in reliance on, a written ruling or regulation of the DOL. 29 U.S.C. §259(a).

Second, an employer may only avoid liability for liquidated damages if it proves it had a good faith reasonable basis for believing its conduct did not violate the FLSA. 29 U.S.C. §260.

Third, an employer that willfully violates the FLSA is liable for an extension of the limitations period from two years, to three. 29 U.S.C. §255(a).

An employer is in willful violation if it either knew or was in reckless disregard for the matter of whether its conduct was prohibited by the FLSA. *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988). *See also* 29 C.F.R. §§578.3 and 578.4 (imposing additional penalties for willful violations, and establishing criteria).

Given this statutory background, the *Auer-Lee* version of the window of correction would be invalid under *Betts*, 492 U.S. 158 (1989); under *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual*, 463 U.S. 29, 43 (1983) (agency rule arbitrary and capricious if "relied on factors which Congress had not intended it to consider, [or] entirely failed to consider an important aspect of the problem"); and under the Administrative Procedures Act, 5 U.S.C. §706(2)(A) and (C) (court must hold unlawful, agency action that is arbitrary or capricious, or that conflicts with governing statute).

4. *A disjunctive interpretation eviscerates the compensation and deterrence objectives of the FLSA, and effectively leaves employees without a remedy.*

As the Court acknowledged in *McKennon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879, 884 (1995), the fact that a violation has occurred cannot be disregarded altogether, since statutes such as the FLSA implicate compensation and deterrence objectives which must be vindicated.

Under a disjunctive interpretation bereft of any requirement that the impermissible docking have been made inadvertently, no one would bother to comply, and no one would dare sue.

An employer might just as well merely give each of its employees honorific titles, declare them all exempt from overtime wages, then dock their allegedly predetermined, "guaranteed" salary any number of times, for any number of impermissible reasons, for any number of years, even with full

knowledge such conduct is prohibited. The worst that could happen, is the employer may eventually be sued. Then it merely has to repay wages it should never have docked in the first place, without even any requirement for payment of interest on those wages.

Since employees would always lose (perhaps after years of litigation), and lose regardless of the extent of the employer's violations, there would be no one to sue on their behalf. Effectively, "executive" employees would have rights, but no remedy.

B. The Employer Must Comply With All Requirements Imposed By The Window

In the narrow circumstances where the employer may be permitted to avail itself of the window of correction, it must do so completely and in good faith. The regulation requires the errant employer promise future compliance. This must mean compliance with all aspects of the wage and hour provisions of the FLSA and its regulations. Otherwise, employees would be forced to sue to eradicate each and every impermissible rule, one at a time.

Moreover, given the definition of willful violation set forth in *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988), and 29 C.F.R. §578.3, if an employer does not correct all its policies as soon as the problem is brought to its attention, this failure should be clear evidence of a willful violation, a violation that is outside the permissible scope of the window of correction altogether.

It is an anomaly in the law to allow a subsequent remedial measure to eliminate previously accrued liability. The least that should be expected from employers in exchange for this rare forgiveness, is total correction and total compliance. After all, implementing regulations of the DOL -- just as exemptions from the FLSA generally -- are narrowly construed against employers. *O'Neal v. Barrow County*, 980 F.2d 674, 676-677 (11th Cir. 1993).

CONCLUSION

For the foregoing reasons, judgment in favor of the employer should be reversed.

Respectfully submitted,

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